

## SYMPOSIUM ON UNDOING DISCRIMINATORY BORDERS

## RACE DISCRIMINATION EFFACED AT THE INTERNATIONAL COURT OF JUSTICE

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This essay examines the interpretation of the core international treaty dedicated to the elimination of racial discrimination, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>1</sup> and in particular how the prohibition on race discrimination applies to the treatment of migrants. This essay is timely, as CERD has travelled from the margins of human rights law to the center of the hottest interstate lawfare.<sup>2</sup> At the time of writing, the first ever interstate dispute before any UN treaty body is before the CERD Committee,<sup>3</sup> and CERD has been invoked in several interstate cases before the International Court of Justice (ICJ). Unfortunately, this crucible of adjudication has not marked an increase in principled interpretation. This essay critiques the recent admissibility ruling of the ICJ in *Qatar v. U.A.E.*<sup>4</sup> for its marginalization of the prohibition of race discrimination, in particular the failure meaningfully to consider how nationality discrimination may constitute prohibited race discrimination.

CERD contains a provision permitting states to distinguish between citizens and non-citizens. It thus accommodates the entitlement of states to control the admission of non-citizens. However, migration controls frequently distinguish between different groups of non-citizens, establishing stratified hierarchies of migration opportunities.<sup>5</sup> These categorizations often reflect pre-existing global hierarchies, with strong echoes of empire and colonialism.<sup>6</sup> Recent scholarship has re-centered race and other discriminatory grounds in migration studies.<sup>7</sup> Ethicists' attempts to justify the right to exclude generally stipulate that exclusion must not be racist.<sup>8</sup> Against

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<sup>1</sup> [International Convention on the Elimination of All Forms of Racial Discrimination](#), Dec. 21, 1965, T.I.A.S. No 94-1120, 660 UNTS 195 [hereinafter CERD].

<sup>2</sup> See, e.g., Comm. On the Elimination of Racial Discrimination, [Inter-State Communication Submitted by the State of Palestine Against Israel](#), UN Doc. CERD/C/100/5 (Dec. 12, 2019).

<sup>3</sup> David Keane, [CERD Reaches Historic Decisions in Inter-State Communications](#), EJIL:TALK! (Sept. 6, 2019).

<sup>4</sup> [Application of the International Convention on the Elimination of All Forms of Racial Discrimination](#) (Qatar v. U.A.E.), Application Instituting Proceedings (ICJ, June 11, 2018).

<sup>5</sup> Steffen Mau et al., [The Global Mobility Divide: How Visa Policies Have Evolved over Time](#), 41 J. ETHNIC & MIGRATION STUD. 1192, 1192–213 (2015).

<sup>6</sup> MARILYN LAKE & HENRY REYNOLDS, [DRAWING THE GLOBAL COLOUR LINE: WHITE MEN'S COUNTRIES AND THE INTERNATIONAL CHALLENGE OF RACIAL EQUALITY](#) (2012).

<sup>7</sup> Antje Ellermann, [Discrimination in Migration and Citizenship](#), 46 J. ETHNIC & MIGRATION STUD. 2463 (2020).

<sup>8</sup> Sara Fine, [Immigration and Discrimination](#), in *MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP* 125 (Sarah Fine and Lea Ypi eds., 2016).

this backdrop, what is puzzling is not the racialized nature of migration controls, but rather the relative lack of attention afforded to whether and when they are legally racially discriminatory.

*Discrimination on Grounds of Race and Citizenship in CERD*

CERD defines “racial discrimination” in Article 1(1) as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

This broad definition would appear capable of extending to a distinction, exclusion, or restriction in the field of migration control, including decisions about admission, exclusion, or expulsion, where such a distinction is made on the grounds of race, as broadly defined in Article 1(1) to include national origin. Article 5 further expands on the “human rights and fundamental freedoms” protected by CERD and includes, “[t]he right to freedom of movement and residence within the border of the State,”<sup>9</sup> and “right to nationality.”<sup>10</sup> The framing of CERD’s obligations is in part explained by the powerful preambular words that the international community is “[c]onvinced that the existence of racial barriers is repugnant to the ideals of any human society”.

However, Article 1(1) is conditioned by the following two provisions:

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

On its face, Article 1(2) covers distinctions between citizens and non-citizens, *irrespective of whether these distinctions also differentiate on other grounds*. A better reading is that CERD permits distinctions based on nationality, but this does not give states carte blanche to discriminate on grounds of race. At least three reasons support that interpretation. First, it is well established that limitations or exceptions to human rights provisions should be read narrowly.<sup>11</sup> Second, the Convention text indicates that it applies to non-citizens because every obligation is framed broadly to apply to “eliminating racial discrimination *in all its forms*”; rights are guaranteed to “*everyone*, without distinction as to race, colour, or national or ethnic origin,”<sup>12</sup> and the treaty includes the right to effective remedies which applies to “*everyone* within [a state’s] jurisdiction.”<sup>13</sup> Third, a wider reading has been said to constitute a “‘manifestly absurd or unreasonable’ reading of” CERD, “not corresponding to its object and purpose.”<sup>14</sup>

The CERD Committee’s General Recommendation XXX sets out that

<sup>9</sup> CERD, *supra* note 1, art 5(d)(i).

<sup>10</sup> *Id.* art 5(d)(iii).

<sup>11</sup> See *Klass & Others v. Germany*, App. No. 5029/71, para. 42 (Eur. Ct. H.R., Sept. 6, 1978).

<sup>12</sup> CERD, *supra* note 1, art 5 (emphasis added).

<sup>13</sup> *Id.* art 6 (emphasis added). See also PATRICK THORNBERRY, [THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY](#) (2016).

<sup>14</sup> THORNBERRY, *supra* note 13, at 158.

differential treatment based on citizenship or immigration status will constitute [race] discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.<sup>15</sup>

Unfortunately, this states a conclusion, but does not provide a reasoned justification for the interpretation put forward, nor a clear framework for analysis. As Tendayi Achiume notes, it leaves much in the “grey zone.”<sup>16</sup> The key missing issue is not the justification for the differentiation (legitimate aim and proportionality) but rather the legally prior question of whether and when differentiation against non-nationals may be indirectly racially discriminatory.

Migration controls are increasingly understood as racially discriminatory in scholarship and advocacy, and those subject to them call out the stigmatizing injury they suffer. There is also an episodic recognition of this fact before global, regional, and national human rights bodies. The conditions were thus ripe for the ICJ to intervene with authoritative, principled, and sophisticated reasoning on racial discrimination in the context of migration. Regrettably, in our view the Court took a wrong turn.

#### *Discrimination on Grounds of Race and Citizenship at the ICJ*

The dispute between Qatar and the U.A.E. arose out of a range of actions taken by the U.A.E. against Qatari nationals, including collective expulsion and entry bans. The measures applied *only* to non-citizens who were Qatari; it was not, therefore, a policy or practice that applied generally to non-citizens.<sup>17</sup> Qatar brought an action in the ICJ requesting the Court to adjudge and declare that the U.A.E. had violated Articles 2, 4, 5, 6, and 7 of CERD inter alia for “[e]xpelling, on a collective basis, all Qataris from, and prohibiting the entry of all Qataris into, the UAE on the basis of their national origin”.<sup>18</sup>

#### *Direct Racial Discrimination: Nationality v. National Origin*

The Court observed in relation to the first claim that the “Parties disagree on whether the term ‘national origin’ in Article 1, paragraph 1 . . . encompasses current nationality.”<sup>19</sup> In reflecting on the “ordinary meaning” of “national or ethnic origin,” the Court observed

These references to “origin” denote, respectively, a person’s bond to a national or ethnic group at birth, whereas nationality is a legal attribute which is within the discretionary power of the State and can change during a person’s lifetime . . . . The Court notes that the other elements of the definition of racial discrimination, as set out in Article 1, paragraph 1, of the Convention, namely race, colour and descent, are also characteristics that are inherent at birth.<sup>20</sup>

There are several problematic features of this reasoning.

<sup>15</sup> Comm. on the Elimination of Racial Discrimination, [General Recommendation No. XXX on Discrimination Against Non-Citizens](#), UN Doc. CERD/C/64/Misc.11/rev.3, para. 4 (2004).

<sup>16</sup> E. Tendayi Achiume, *Governing Xenophobia*, 51 VAND. J. TRANSNAT’L L. 333 (2018).

<sup>17</sup> See [Application of the International Convention on the Elimination of All Forms of Racial Discrimination](#) (Qatar v. U.A.E.) Judgment, para. 57 (ICJ, Feb. 4, 2021) [hereinafter Qatar v. U.A.E.].

<sup>18</sup> *Id.* at para. 21.

<sup>19</sup> *Id.* at para. 73.

<sup>20</sup> *Id.* at para. 81.

First, the Court appears to have adopted a form of *ejusdem generis* reasoning to interpret the grounds of discrimination, finding that the protected grounds are all characteristics “that are inherent at birth.” The emphasis on characteristics “inherent at birth” is, at best, legally unwarranted and, at worst, redolent of the discredited notion that race has some genetic basis.

There is nothing in the CERD text about characteristics at birth, as Diane Desierto has also pointed out.<sup>21</sup> Yet, the ICJ adds this distortive gloss “at birth” to its account of the Convention’s object and purpose.<sup>22</sup> Moreover, the other grounds enumerated in Article 1(1) are not “inherent at birth” either. The inclusion of the term “colour” was not intended to signal a biological basis for race, but rather that racial hierarchies are often constructed along lines of visible difference.<sup>23</sup> Skin and hair pigmentation are not “inherent at birth” but rather change over the life-course and adapt to local conditions, and whether particular pigmentations are viewed as racial difference varies across time and place. Similarly, the concept of “descent” in Article 1(1) has opened the way for consideration of caste-based discrimination in CERD,<sup>24</sup> again, a basis for hierarchy that may be socially and intergenerationally transmitted, but is certainly not “inherent at birth.”

Second, even if the Court was correct to insist that unlawful racial discrimination is concerned with characteristics “inherent at birth” (or to put it another way, immutability), the assertion that nationality “can change during a person’s lifetime” is highly strained. The Court is at pains to highlight the transitory nature of nationality (referring to “current nationality” on at least forty-two occasions) as opposed to the immutability of race;<sup>25</sup> yet this stark distinction may be challenged.<sup>26</sup> Given that one has to find a state to offer a new nationality, nationality is in practice a highly ascriptive status—that is why political theorists struggle to justify the “birthright lottery” that is citizenship.<sup>27</sup> Indeed, for most of the world, nationality is an accident of birth, a matter of “descent,” not choice.

In any event, we may question the logical consequences of this argument. Is it that Qatari citizens can avoid these bans because their citizenship is not immutable? That is, they can simply change their nationality? And even if that were empirically justified (which it is not) one could argue that they should not be required to change their nationality because to do so would involve “unacceptable costs.”<sup>28</sup>

Third, the Court’s reasoning does not grapple with the question whether a distinction, exclusion, restriction, or preference can be based on race (which, it will be recalled, under CERD includes national or ethnic origin) and based on nationality. It rather views nationality and national origin as mutually exclusive. However, nationality and origin are strongly connected, as nationality is frequently anchored in descent, through the widespread implementation of *jus sanguinis* nationality laws either in whole or in part.<sup>29</sup>

<sup>21</sup> Diane Desierto, *A Study in Contrasting Jurisdictional Methodologies: The International Court of Justice’s February 2021 Judgments in Iran v. U.S.A and Qatar v. U.A.E.*, EJIL:TALK! (Feb. 15, 2021).

<sup>22</sup> *Qatar v. U.A.E.*, *supra* note 17, para. 96.

<sup>23</sup> Patrick Shin, *Discrimination and Race*, in THE ROUTLEDGE HANDBOOK OF THE ETHICS OF DISCRIMINATION 196 (Kasper Lippert-Rasmussen ed., 2017).

<sup>24</sup> Annapurna Waughray & David Keane, *CERD and Caste-Based Discrimination*, in FIFTY YEARS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A LIVING INSTRUMENT 121 (Annapurna Waughray & David Keane eds., 2017).

<sup>25</sup> See *Qatar v. U.A.E.*, *supra* note 17, at para. 9, dissent of Bhandari J.

<sup>26</sup> *Qatar v. U.A.E.*, *supra* note 17, at para. 9, dissent of Robinson J.

<sup>27</sup> See AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009).

<sup>28</sup> *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143, 195 (Can.), cited in TARUNABH KHAITAN, *A THEORY OF DISCRIMINATION LAW* at 57 n. 33 (2015).

<sup>29</sup> See U.S. Library of Congress, *Birthright Citizenship Across the Globe* (2018). See also *Qatar v. U.A.E.*, *supra* note 17, para. 11, dissent of Bhandari J; para. 8, dissent of Robinson J.

The Court buttressed its arguments on Article 1(1)'s ordinary meaning by considering Articles 1(2) and (3) and found that this “indicates that the Convention does not prevent States parties from adopting measures that restrict the right of non-citizens to enter a State and their right to reside there—rights that are in dispute in this case—on the basis of their current nationality”.<sup>30</sup> The Court did not, however, consider whether Article 1(2) properly applies to distinctions *within* groups of non-citizens. In particular, in this case, the policy under review did not apply to non-citizens *generally* but was explicitly and purposefully directed at a particular nationality, as an arguably punitive measure in retaliation for the perceived transgressions of the Qatari government. To find such a policy protected by Article 1(2) is arguably an unjustifiable extension of its meaning.

Turning to object and purpose, the Court concluded that CERD “was clearly not intended to cover every instance of differentiation between persons based on their nationality. Differentiation on the basis of nationality is common and is reflected in the legislation of most state parties.”<sup>31</sup> Leaving aside the fact that the Court did not explain the content or relevance of state practice, our core concern is that the Court has set up an “all or nothing” approach to this issue. In our view, the question is not whether the Convention was or was not *intended to cover every instance of differentiation between persons based on their nationality* but, rather, when does nationality discrimination overlap materially with national origin discrimination and when may it constitute race discrimination?

#### *Indirect Racial Discrimination: Nationality as National Origin*

While CERD does not explicitly adopt the terminology of “direct” and “indirect” discrimination, it defines discrimination to include acts that have the purpose *or effect* of discriminating. The latter notion is the hallmark of indirect discrimination. The Qatari government argued that the measures in this case “have the purpose or effect of nullifying or impairing the rights and freedoms of persons of Qatari national origin, in the sense of their Qatari heritage and culture.”<sup>32</sup> The Court apparently accepted the *notion* of indirect discrimination,<sup>33</sup> but concluded

while the measures based on current Qatari nationality may have collateral or secondary effects on persons born in Qatar or of Qatari parents, or on family members of Qatari citizens residing in the UAE, this does not constitute racial discrimination within the meaning of the Convention. In the Court's view, the various measures of which Qatar complains do not, either by their purpose or their effect, give rise to racial discrimination against Qataris as a distinct social group on the basis of their national origin.

This reasoning is noteworthy for its brevity, especially given that, ordinarily, a claim of “collateral or secondary effects” in discrimination law needs to be empirically tested and, if established, subject to scrutiny as to any potential justification. Given that Qatari's citizenship law is largely based on descent,<sup>34</sup> with very few Qataris naturalized,<sup>35</sup> it is axiomatic that a measure targeted to Qataris has a vastly disproportionate impact on those of Qatari heritage and national or ethnic origin.

<sup>30</sup> [Qatar v. U.A.E.](#), *supra* note 17, para. 83.

<sup>31</sup> *Id.* at para. 87.

<sup>32</sup> *Id.* at para. 47.

<sup>33</sup> *Id.* at para. 112.

<sup>34</sup> [Law No. 38 of 2005 on the Acquisition of Qatari Nationality](#) art. 1, Oct. 30, 2005.

<sup>35</sup> Peter Kovessy, [The \(Narrow\) Path to Qatari Citizenship](#), DOHA NEWS (Oct. 9, 2014). *See also* [Qatar v. U.A.E.](#), *supra* note 17, para. 11, dissent of Bhandari J.

*Implications*

Human rights norms take shape in multiple fora, including domestic and regional ones. On this occasion, the global level has fallen short. The division in the ICJ in this case is striking, with its President among the dissenting judges. The ICJ's determination of mixed questions of fact and law at the admissibility stage and its misinterpretation of CERD suggest the ruling may come to be relegated to the annals of legal missteps. On the other hand, the CERD Committee has not articulated a convincing alternative approach or framework to determine these issues.

CERD has a particularly important place in international human rights law, and indeed, the *jus cogens* character of the prohibition on race discrimination reflects a remarkable consensus on its wrongfulness.

If CERD is to play its rightful role in setting standards to root out racially discriminatory migration controls, we need a deeper explication of the relationship between race, and the other grounds that appear in CERD as part of its conception of race, namely "colour, descent, or national or ethnic origin," and a principled framework to assess indirect discrimination on grounds of race. The provisions of Articles 1(2) and (3) also require careful explication and can no longer be glossed over in the manner the Committee attempted in General Recommendation XXX.<sup>36</sup>

Whether at the highest level of generality (establishing global lists of states whose nationals require visas) or the most localized level of enforcement (deciding which travelers to approach on a train platform to ask for proof of migration status), the categorizations inherent in migration control may be racially discriminatory, either directly or indirectly. International law has an important role to play in establishing the normative standards to assess when this is so, holding states to account and providing guidance on how to avoid racially discriminatory practices. This essay is a first step in a larger project to recenter the discussion of race in international legal scholarship on migration.

<sup>36</sup> See Michelle Foster and Timnah Baker, [Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law?](#), 11 COLUM. J. RACE & L. 83 (2021).